

KATHIRAVELU GANESAN & ANOR**a**

v.

KOJASA HOLDINGS BHDSUPREME COURT, KUALA LUMPUR
ANUAR ZAINAL ABIDIN CJ (MALAYA)**b**

MOHD AZMI FCJ

GOPAL SRI RAM JCA

[CIVIL APPEAL NO: 04-44 OF 1994]

6 JANUARY 1997

LABOUR LAW: *Industrial Court - Jurisdiction, extra-territorial - Workman employed within Malaysia by Malaysian employer but required to carry out duties in a foreign country - Dismissal of workman - Disputes thereof - Whether of the nature of extra-territorial disputes - Whether Industrial Court seised of jurisdiction to adjudicate - Industrial Relations Act 1967, s. 20(1)*

c

LABOUR LAW: *Industrial Court - Jurisdiction, challenges to - Whether open to challenge jurisdiction without attacking the Minister's act of referring the dispute to Industrial Court - Point at which challenge ought to be taken - Whether at the point at which the Minister makes the reference - Industrial Relations Act 1967, s. 20(3)*

d

LABOUR LAW: *Industrial Court - Jurisdiction, challenges to - Reference of disputes by Minister under s. 20(3) Industrial Relations Act 1967 - Whether conferring threshold jurisdiction upon the Industrial Court - Whether open to challenge by way of preliminary objection*

e

LABOUR LAW: *Industrial Court - Jurisdiction - Reference of disputes by Minister under s. 20(3) Industrial Relations Act 1967 - Whether Industrial Court could refuse to make decision on disputes properly referred to it*

f

This was an appeal against the order of *prohibition* which the High Court had issued against the Industrial Court to prevent the latter Court from adjudicating on a dispute between the first appellant ('the appellant') and the respondent. The appellant is a citizen of Sri Lanka and was employed by the respondent, a Malaysian company based in Sabah. In 1988 the respondent seconded the appellant to Singapore to serve its related companies there. While working in Singapore, the appellant had paid tax in the Republic and had also contributed to the Central Provident Fund there. In 1989 the respondent terminated the appellant's service. Following a complaint by the appellant, the Director General of Industrial Relations referred the dispute to the Minister, who in turn referred it to the Industrial Court under s. 20 of the Industrial Relations Act 1967 ('the Act'). The respondent did not challenge this reference by the Minister.

g**h****i**

- a* Before the Industrial Court, however, the respondent took a preliminary objection, complaining in essence that the Industrial Court had no jurisdiction to hear and determine the dispute. The objection was overruled, whereupon the respondent applied to the High Court for an order of *prohibition* to prevent the Industrial Court from adjudicating upon the dispute. The learned Judge
- b* ruled that the appellant, at the time of the dismissal, was a foreigner working in Singapore, and that being so, it was not open to the Industrial Court, having as it were no extra-territorial jurisdiction, to entertain and adjudicate the dispute. An order of *prohibition*, hence, was issued by the Court.

- c* The appellant appealed. Before the learned appellate Judges herein two primal questions arose for consideration, namely: (i) whether having regard to the facts, the Industrial Court had jurisdiction to adjudicate upon the dispute referred to it by the Minister (ii) Whether it was open to the respondent to challenge the jurisdiction of the Industrial Court without having attacked the Minister's act of referring the dispute to that Court.

- d* **Held:**
Per Gopal Sri Ram JCA

- e* [1] The learned Judge was wrong in holding that the Industrial Court lacked jurisdiction to hear and decide upon the dispute properly referred to it by the Minister.

- f* [1a] The fact that a workman who is engaged within Malaysia is required by his employer, who is also within the jurisdiction, to carry out his duties in a foreign country will not by itself place his subsequent dismissal in the category of extra-territorial disputes. This is so irrespective of whether he was required to pay taxes levied by that country or to contribute towards any savings scheme there.

- g* [1b] The facts of this case do not give rise to the exercise of any extra-territorial jurisdiction. The fact that the appellant was engaged within the jurisdiction by an employer within the jurisdiction must conclude the issue of extra-territoriality against the respondent. It ought also to be noted that in this case the power to dismiss the appellant was at all times vested in the respondent who was well within the territorial jurisdiction of the Industrial Court.

- h* [2] At the heart of this appeal lies the important difference between the class of cases where there is lack of authority on the part of a public decision-maker to enter upon an inquiry ('the threshold jurisdiction') and the class of cases where there is such authority, but the decision maker exceeds the bounds of his decision-making power ('the Anisminic jurisdiction')
- i*

- [2a] In the context of industrial adjudication, there are different levels at which the machinery created by statute operates, namely (i) the conciliatory level i.e where the Director General seeks to settle the dispute upon a complaint under s. 20(1) of the Act (ii) the reporting level i.e. where the Director General reports to the Minister after finding the disputes irreconcilable (iii) the referral level i.e where the Minister decides whether or not to refer the dispute to the Industrial Court (iv) the adjudicatory level. a
- [2b] The Industrial Court, unlike the ordinary Courts, is not available for direct approach by an aggrieved party and access to it may only be had through the the first three levels aforesaid. The Industrial Court is therefore empowered to take cognizance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction. b
- [3] Because of the different situations in which challenge to a deciding power may be taken, the term ‘jurisdiction’ must take its colour from its context. Thus, when one speaks of ‘the jurisdiction’ of the Industrial Court, it is in essence to determine which jurisdiction that is being spoken of. It may refer to the threshold jurisdiction conferred by the Ministerial act of referring a trade dispute, or it may equally refer to jurisdiction in the wider Anisminic sense. c
- [4] The crucial question here is the point at which the challenge ought to be taken, specifically, whether it should be taken at the point at which the Minister makes the reference or at the point at which the Industrial Court is seised of the dispute. d
- [4a] The threshold jurisdiction of the Industrial Court may only be questioned by challenging the Minister’s reference. It follows that a party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry, e.g. because the dispute is extra-territorial in nature, must do so by seeking to quash the Minister’s reference, and, in the same application ask for an order of prohibition against that Court. The threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him. e
- [4b] Having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection. The legislature’s paramount concern in passing the Act is to ensure speedy disposal of industrial disputes, and permitting preliminary objections to the threshold jurisdiction being taken will only delay industrial adjudication. f
- g
- h
- i

a [5] The Federal Court decision in *Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v. Lee Eng Kiat & Ors.* should not be taken as going against the proposition in *Assunta Hospital v. Dr. A. Dutt (No.1)* that the threshold jurisdiction of the Industrial Court may only be questioned by challenging the Minister's reference. Rather, the case of *Fung Keong* should be taken as establishing a very limited exception to the proposition, i.e. only in cases where the representations under s. 20(1) of the Act are made beyond the time prescribed by that section. The decision in *Fung Keong* may be justified upon the narrow ground that the Minister had acted in violation of the provisions of s. 20(1) by referring to the Industrial Court when the representations were made to the Director General beyond the statutory time limit. In those circumstances the Minister obviously had no power to confer threshold jurisdiction upon the Industrial Court.

d [5a] It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s. 20(1) were made out of time, he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order for *prohibition* against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication.

f [5b] Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion, and in the process deal with the jurisdictional question e.g. whether the claimant is a workman or not or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be dealt with as preliminary objections.

g [Appeal allowed. Order of prohibition set aside. Dispute remitted to Industrial Court for hearing on merits.]

[Bahasa Malaysia Translation of Headnotes]

h **UNDANG-UNDANG BURUH:** Mahkamah Perusahaan - Bidangkuasa, luar wilayah - Pekerja diambil bekerja di Malaysia oleh majikan Malaysia tetapi dikehendaki menjalankan kewajipan di negeri asing - Pemecatan pekerja - Pertikaian mengenainya - Samada mempunyai sifat pertikaian luar wilayah - Samada Mahkamah Perusahaan terlepas bidangkuasa untuk menghakimi - Akta Perhubungan Perindustrian 1967, s. 20(1)

i

UNDANG-UNDANG BURUH: Mahkamah Perusahaan - Bidangkuasa, mencabar - Samada terbuka untuk mencabar bidangkuasa tanpa menyerang perbuatan Menteri merujuk pertikaian kepada Mahkamah Perusahaan - Tahap di mana cabaran seharusnya diambil - Samada pada tahap di mana Menteri membuat rujukan - Akta perhubungan Perindustrian 1967, s. 20(3)

a

UNDANG-UNDANG BURUH: Mahkamah Perusahaan - Bidangkuasa, cabaran untuk - Rujukan pertikaian oleh Menteri di bawah s. 20(3) Akta Perhubungan Perindustrian 1967 - Samada memberikan ambang bidangkuasa ke atas Mahkamah Perusahaan - Samada terbuka kepada cabaran melalui bantahan awal

b

UNDANG-UNDANG BURUH: Mahkamah Perusahaan - Bidangkuasa - Rujukan pertikaian oleh Menteri di bawah s. 20(3) Akta Perhubungan Perindustrian 1967 - Samada Mahkamah Perusahaan boleh enggan untuk membuat keputusan atas pertikaian yang dirujuk kepadanya dengan betul

c

Ini merupakan rayuan ke atas Perintah larangan yang telah dikeluarkan oleh Mahkamah untuk menghalang Mahkamah yang terkemudian daripada mengadjudikasikan pertikaian antara perayu pertama ('perayu tersebut') dan responden. Perayu merupakan warga negara Sri Lanka dan telah diambil bekerja oleh responden, sebuah syarikat Malaysia yang berasas di Sabah. Dalam tahun 1988 responden telah meminjamkan perayu ke Singapura untuk berkhidmat dengan syarikat-syarikatnya yang berkaitan. Ketika bekerja di Singapura, perayu telah membayar cukai di Republik itu dan telah juga menyumbang kepada Central Provident Fund di sana. Dalam tahun 1989 responden telah menamatkan perkhidmatan perayu. Berikutan dengan satu aduan oleh perayu, Ketua Pengarah Perhubungan Perindustrian telah merujuk pertikaian itu kepada Menteri, yang sebaliknya pula telah merujukkannya kepada Mahkamah Perusahaan di bawah s. 20 Akta perhubungan Perindustrian 1967 ('Akta tersebut'). Responden telah tidak mencabar rujukan oleh Menteri ini.

*d**e**f*

Di hadapan Mahkamah Perusahaan, walaubagaimanapun, responden telah membuat bantahan awal, mengadu secara penting bahawa Mahkamah Perusahaan tidak mempunyai bidangkuasa untuk mendengar dan menentukan pertikaian itu. Bantahan itu telah ditolak, responden oleh itu telah memohon kepada Mahkamah Tinggi untuk mendapatkan perintah larangan bagi menghalang Mahkamah Perusahaan daripada mengadjudikasikan pertikaian itu. Hakim yang bijaksana memutuskan bahawa perayu, pada waktu pemecatan itu, merupakan seorang pekerja asing di Singapura, dan dalam keadaan yang sedemikian, ianya tidak terbuka kepada Mahkamah Perusahaan, sebagaimana keadaannya tidak mempunyai bidangkuasa luar wilayah, untuk melayan serta mengadjudikasikan pertikaian itu. Satu perintah larangan, oleh itu, telah dikeluarkan oleh Mahkamah.

*g**h**i*

- a* Perayu telah merayu. Di hadapan Hakim-hakim rayuan yang bijaksana di sini dua persoalan penting berbangkit untuk pertimbangan, iaitu: (i) samada dalam mempertimbangkan fakta-fakta, Mahkamah Perusahaan mempunyai bidangkuasa untuk mengadjudikasikan pertikaian yang dirujuk kepada Menteri. (ii) Samada ianya terbuka kepada responden untuk mencabar bidangkuasa
- b* Mahkamah Perusahaan tanpa merosakan perbuatan Menteri merujuk pertikaian itu kepada Mahkamah itu.

Diputuskan**Oleh Gopal Sri Ram HMR**

- c* [1] Hakim yang bijaksana adalah salah dalam memutuskan bahawa Mahkamah Perusahaan betiadaan bidangkuasa untuk mendengar dan memutuskan pertikaian itu yang telah dirujuk kepada Menteri dengan sewajarnya..
- d* [1a] Hakikat bahawa seseorang pekerja yang telah diambil bekerja di Malaysia dikehendaki oleh majikannya, yang juga berada dalam bidangkuasa, untuk menjalankan tugas-tugasnya di sebuah negara asing tidak akan dengan sendirinya meletakkan pemecatannya yang berikutan dalam kategori pertikaian-pertikaian luar wilayah. Keadaan ini sedemikian, tanpa menghiraukan samada beliau dikehendaki membayar
- e* cukai yang dikenakan oleh negeri itu atau untuk menyumbang terhadap mana sekim simpanan di situ.
- [1b] Fakta-fakta kes ini tidak menyebabkan berbangkitnya perlaksanaan mana-mana bidangkuasa luar wilayah. Hakikat bahawa perayu telah diambil bekerja dalam bidangkuasa oleh sesebuah majikan dalam
- f* bidangkuasa mestilah menamatkan isu luar wilayah terhadap responden. Adalah harus juga diambil perhatian bahawa dalam kes ini kuasa untuk memecat perayu adalah pada setiap masa terletakhak pada responden yang sememangnya berada dalam bidangkuasa wilayah Mahkamah Perusahaan.
- g* [2] Di tengah-tengah rayuan ini terbentang perbezaan yang penting antara kelas kes-kes di mana pembuat keputusan awam ketiadaan kuasa untuk memasukkan satu siasatan ('ambang bidangkuasa') dan kelas kes di mana terdapatnya kuasa yang sedemikian, tetapi pembuat keputusan telah melampaui batas kuasa membuat keputusannya ('bidangkuasa
- h* Anisminic')
- [2a] Dalam konteks adjudikasi perindustrian, terdapat berbagai tahap di mana mesin yang diwujudkan oleh statut beroperasi, iaitu (i) tahap pendamaian
- i* iaitu, di mana Ketua Pengarah berusaha untuk menyelesaikan pertikaian

- sesuatu aduan di bawah s. 20(1) Akta tersebut (ii) tahap yang membuat laporan iaitu di mana Ketua Pengarah melaporkan kepada Menteri selepas mendapati pertikaian itu tidak boleh dipulihkan (iii) tahap rujukan iaitu di mana Menteri memutuskan samada atau pun tidak merujuk pertikaian kepada Mahkamah Perusahaan (iv) tahap adjudikasi. *a*
- [2b] Mahkamah Perusahaan, tidak seperti Mahkamah-mahkamah biasa, tidak boleh didekati secara terus oleh mana-mana pihak yang terkilan dan akses kepadanya hanya melalui tiga tahap pertama yang tersebut di atas. Mahkamah Perusahaan adalah dengan itu diberi kuasa untuk mengamnbil perhatian mengenai pertikaian perdagangan dan mengadjudikasinya hanya apabila Menteri membuat rujukan. Dalam erti kata lain, rujukan itulah yang membentuk ambang bidangkuasa. *b*
- [3] Disebabkan situasi-situasi yang berbeza dalam mana cabaran kepada kuasa pemutus boleh diambil, ungkapan “bidangkuasa” mungkin bercorak menurut kenteksnya. Dengan itu, apabila seseorang menyebut mengenai “bidangkuasa” Mahkamah Perusahaaan, ianya penting untuk menentukan bidangkuasa yang mana yang dimaksudkan. Ianya mungkin merujuk kepada ambang bidangkuasa hasil daripada rujukan oleh Menteri akan pertikaian perdagangan, atau ianya berkemungkinan juga merujuk secara luasnya maksud Anisminic. *c*
- [4] Persoalan yang penting di sini adalah titik waktu di mana cabaran itu seharusnya diambil, secara khususnya, samada ianya seharusnya diambil pada titik waktu di mana Menteri membuat rujukan atau pada titik waktu di mana Mahkamah Perusahaan terlepas daripada pertikaian itu. *d*
- [4a] Ambang bidangkuasa Mahkamah Perusahaan hanya boleh dipersoalkan dengan mencabar rujukan Menteri. Di dapati bahawa sesuatu pihak kepada pertikaian yang ingin menegaskan bahawa Mahkamah perusahaan tidak mempunyai bidangkuasa untuk memasukkan siasatan, contohnya kerana pertikaian itu bersifat luar wilayah, mestilah melakukan sedemikian dengan berusaha untuk membatalkan rujukan Menteri, dan, dalam permohonan yang sama memohon bagi mendapatkan satu perintah larangan terhadap Mahkamah itu. Ambang bidangkuasa Mahkamah Perusahaan tidak boleh dicabar tanpa menyertakan Menteri tersebut dan berusaha mendapatkan relief terhadapnya. *e*
- [4b] Dalam memberi perhatian kepada sekim am Akta tersebut, Parlimen tidak mempunyai niat untuk ambang bidangkuasa dicabar di hadapan Mahkamah Perusahaan melalui satu bantahan awal. Perhatian paling utama badan perundangan meluluskan Akta itu adalah bagi memastikan penyelesaian segera pertikaian-pertikaian perindustrian, dan membenarkan *f*
- g*
- h*
- i*

- a* bantahan awal ke ambang bidangkuasa diambil akan hanya melengahkan adjudikasi perindustrian.
- b* [5] Keputusan Mahkamah Persekutuan dalam *Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v. Lee Eng Kiat & Ors.* tidak seharusnya dianggap sebagai menentangkan proposisi dalam *Assunta Hospital v. Dr. A. Dutt (No. 1)* bahawa ambang bidangkuasa Mahkamah perusahaan hanya boleh dipersoalkan dengan mencabar rujukan Menteri. Sebaiknya, kes *Fung Keong* dianggap sebagai menentukan suatu pengecualian yang amat terhad kepada proposisi, iaitu hanya dalam kes-kes di mana pengemukaan di bawah s. 20(1) Akta tersebut dibuat melebihi masa yang ditetapkan oleh seksyen itu. Keputusan dalam *Fung Keong* mungkin wajar berdasarkan alasan sempit yang telah Menteri itu bertindak melanggar peruntukan-peruntukan s. 20(1) dengan merujuk kepada Mahkamah Perusahaan sedangkan pengemukaan-pengemukaan itu dibuat kepada Kedua Pengarah di luar had masa berkanun. Dalam keadaan itu
- c*
- d* Menteri tersebut dengan ketaranya tidak berkuasa untuk meletakkan ambang bidangkuasa ke atas Mahkamah perusahaan.
- e* [5a] Didapati bahawa dalam kesemua kes di mana sesuatu pihak kepada pertikaian perdagangan berniat untuk mempersoalkan ambang bidangkuasa Mahkamah Perusahaan untuk membuat sesuatu adjudikasi, melainkan atas alasan-alasan terhad bahawa pengemukaan di bawah s. 20(1) telah dibuat di luar masa, ianya mestilah melakukan sedemikian dengan berusaha untuk membatalkan, melalui *certiorari*, rujukan Menteri dan, dalam prosiding-prosiding yang sama, cuba untuk mendapatkan perintah larangan terhadap Mahkamah Perusahaan daripada melayan pertikaian atas bahawa pihak yang terkemudian tidak mempunyai
- f* bidangkuasa untuk membuat adjudikasi.
- g* [5b] Di mana sesuatu cabaran tidak diambil sedemikian, Mahkamah Perusahaan mestilah dibenarkan untuk memutuskan pertikaian itu sehingga mencapai keputusan dan dalam proses itu menguruskan persoalan bidangkuasa contohnya samada penuntut itu merupakan pekerja atau pun bukan atau sama ada perkara tersebut melibatkan perlaksanaan bidang kuasa luar wilayah. Perkara-perkara sedemikian tidak dalam apa keadaan pun diuruskan sebagai bantahan-bantahan awal.
- h* [Rayuan dibenarkan. Perintah larangan diketepikan. Pertikaian dikemukakan kepada Mahkamah Perusahaan untuk perbicaraan atas merit.]
- i*

Cases referred to:

Cik Aniza Yaacob & Ors v. Mostek Malaysia Sdn Bhd & Ors [1988] 1 MLJ 451
(*aff*)

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147 (*refd*)

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 (*refd*)

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia [1996] 4 CLJ 687 (*refd*)

Minister of Labour and Manpower & Anor v. Wix Corp South East Asia Sdn Bhd [1980] 2 MLJ 248 (*cit*)

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 (*cit*)

Minister of Labour, Malaysia v. Lie Seng Fatt [1990] 2 MLJ 9 (*refd*)

Council of Civil Service Unions v. The Minister for the Civil Service [1985] AC 374
(*cit*)

R Rama Chandran v. Industrial Court of Malaysia [1997] 1 CLJ 147 (*cit*)

Assunta Hospital v. Dr. A. Dutt [1980] 1 MLJ 96 (*aff*)

Inchcape Malaysia Holdings Bhd v. R.B. Gray [1985] 2 MLJ 297 (*ovrd*)

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1981] 1 MLJ 238 (*dist*)

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), 20(3)

[*Appeal from High Court Malaya, Kuala Lumpur; Originating Summons No: R2-25-96-93*]

For the appellant - B Lobo; M/s Lobo & Assoc

For the respondent - N Sivabalah; M/s Shearn Delamore & Co

JUDGMENT

Gopal Sri Ram JCA:

Having allowed this appeal and made the necessary consequential orders, we now give reasons for our decision.

Facts And Background

The appellant (claimant before the Industrial Court), is a citizen of Sri Lanka. He was employed by the respondent, a Malaysian company in Sabah. His employment was conditional upon his work permit being periodically renewed. He worked satisfactorily in Sabah for four years. His work permit expired on 30 April 1988 and further renewal could not be obtained. But the respondent did not terminate his services. Instead, the respondent, with effect from 1 May 1988, seconded him to Singapore where he continued to give corporate advice to the respondent's related companies for the remaining period of his existing contract.

- a* On 11 November 1989 the respondent wrote to the appellant requesting him to resign because he had allegedly performed unsatisfactory work. The appellant, considering himself to have been wrongfully dismissed, complained to the Director-General of Industrial Relations who, having unsuccessfully attempted a reconciliation, referred the dispute to the Minister who then referred it to the Industrial Court under s. 20 of the Industrial Relations Act 1967 ('the Act').

- c* The respondent did not challenge this reference by the Minister. But before the Industrial Court, it took a preliminary objection as to the jurisdiction of that Court to hear and determine the dispute. The Industrial Court, however, overruled the objection and held that it had jurisdiction to entertain and to adjudicate upon the dispute.

- d* The respondent then applied to the High Court to prohibit the Industrial Court from adjudicating upon the dispute on the ground that it was not seised of jurisdiction. It was argued that the appellant, at the date of the alleged dismissal, was not only a foreigner working in Singapore but that he was also paying tax in the Republic and contributing to the Central Provident Fund of that country. In these circumstances the Industrial Court could not adjudicate upon it because that Court lacked extra-territorial jurisdiction. These arguments found favour with the learned Judge who heard the application. He accordingly issued prohibition against the Industrial Court. Against this decision, the appellant appealed to this Court.

The Issues

- f* The arguments addressed to us raised two issues. Both relate to the question of jurisdiction. The first issue is one that was canvassed at all levels in this litigation. It is whether, having regard to the facts of this case, the Industrial Court had jurisdiction to adjudicate upon the dispute referred to it by the Minister.
- g* The second issue, is closely related to the first. It was raised before the High Court. It relates to the way in which challenges are to be taken to the jurisdiction of the Industrial Court. But it is germane to the appeal, concerns judicial policy and is of general importance. We therefore think it desirable to express our views upon it. It may be conveniently put in the form of a question. Was it open to the respondent to challenge the jurisdiction of the Industrial Court without having attacked the Minister's act of referring the dispute to that Court?

We will address each of these issues in turn.

- i*

The First Issue: Extra-Territoriality

a

The respondent's argument in support of its case may be put in this way. The Industrial Court is a creature of statute. It therefore only has such jurisdiction as is conferred upon it, either expressly or by necessary implication, by the statute creating it, namely, the Act. The Act does not confer extra-territorial jurisdiction upon the Industrial Court. Accordingly, that Court has no extra-territorial jurisdiction. The judgment of Mohamed Dzaiddin J (as he then was) in *Cik Aniza Yaacob & Ors. v. Mostek Malaysia Sdn. Bhd. & Ors.* [1988] 1 MLJ 451 was cited in support of these propositions. Mr. Lobo, who appeared for the appellant, did not seek to question the correctness of the decision in that case. We are unable to see how he possibly could have argued against it. We therefore accept, without hesitation, the correctness of the decision in that case and of the principle it establishes.

b

c

The respondent went on to argue that, on the facts of this case, the representations made by the appellant under s. 20(1) clearly relate to matters which occurred outside the jurisdiction of the Industrial Court. We have, when setting out the fact pattern of this case, adverted to those matters relied upon by the respondent in support of the argument based on extra-territoriality. We do not propose to repeat them here.

d

Mr. Sivabalah, who appeared for the respondent, submitted that the contract between the parties was at an end when the appellant's work permit was not renewed. He argued that a new engagement had occurred in Singapore and that the contract of employment was to be performed in that country. These are matters over which the Industrial Court had no jurisdiction. Lastly, it was submitted for the respondent that the Act was passed for the protection of workmen – whether citizens or foreigners – working in Malaysia in the employment of Malaysian or foreign companies. The Act does not extend to workmen engaged by Malaysian companies in a foreign country to work in that country.

e

f

In support of the appeal, Mr. Lobo argued that no question of an exercise of extra-territorial jurisdiction arises in this case. Here is a case where the employer is a Malaysian company. The contract of employment was entered into in Malaysia and therefore within the jurisdiction of the Industrial Court. The appellant was merely sent by his Malaysian employer to work in Singapore. There was no termination followed by a fresh engagement. There was, therefore, continuity of service in this case. It was also argued that so long as the fact pattern of a given case fell within the ambit of s. 20(1) of the Act, the Industrial Court had jurisdiction to adjudicate upon the dispute.

g

h

So much for the arguments upon the first issue.

i

- a* In our judgment, the facts of this case do not give rise to the exercise of any extra-territorial jurisdiction by the Industrial Court. The fact that the appellant was engaged within the jurisdiction by an employer within the jurisdiction concludes the issue of extra-territoriality against the respondent. That the appellant was required to perform his contract of employment in another
- b* company in a foreign country and was required to pay the taxes levied by that country or to make payments towards any compulsory savings scheme that was in operation in that country cannot, in our judgment, make the dispute extra-territorial in nature. Further, one should not lose sight of the fact that the power to dismiss the appellant was at all times vested in the respondent
- c* who was well within the territorial jurisdiction of the Industrial Court.

It is convenient at this juncture to consider the arguments that deal with the persons to whom the Act is meant to apply.

- d* Meaning no disrespect to Counsel, we find the test suggested by Mr. Lobo to be far too wide while we find that suggested by Mr. Sivabalah to be far too narrow. In our judgment, it is undesirable to formulate any hard and fast rule that is meant to govern all cases that arise for decision. It depends very much on the facts of each case. But we think it safe to say this much. The fact that a workman who is engaged within Malaysia is required by his employer, who is also within the jurisdiction, to carry out his duties in a foreign country
- e* will not by itself place his subsequent dismissal in the category of extra-territorial disputes.

- f* We now turn to deal with the second issue. But before we do so, we think it appropriate to make some observations that are, apart from being relevant to the present appeal, also of general importance.

Threshold And Anisminic Jurisdiction: General

- g* At the heart of this appeal lies the important difference between the class of cases where there is lack of authority on the part of a public decision-maker to enter upon an inquiry and the class of cases where there is such authority, but the decision-maker exceeds the bounds of his decision-making power because of something he does or fails to do in the course of the inquiry. The former is termed “threshold jurisdiction” in recognition of a public decision-maker’s inability to cross the threshold, as it were, and enter upon the inquiry
- h* in question. It is jurisdiction in the narrow sense.

- i* The latter class concerns jurisdiction in the wider sense and is generally called “Anisminic jurisdiction”, named after the landmark decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, a case that was to have a profound effect upon the subject of administrative law. It refers to cases where a public decision-maker, having

threshold jurisdiction “misconducts” himself in such a fashion as to exceed his decision-making jurisdiction. a

We use the expression “misconducts” in no pejorative sense, but advisedly because the methods by which a public decision-maker may exceed jurisdiction in the wider sense are not closed. As observed by the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 MLJ 317, 342; [1995] 2 CLJ 748: b

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law. c

This dichotomy between jurisdiction in the narrow and wider sense was recognised, and must now be treated as settled, by the decision of this Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 369, 389: d

The distinction between jurisdiction at the threshold of an inquiry and the wider concept of that term is well brought out in the following passage in the speech of Lord Reid in the landmark decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 at p. 171; [1969] 1 All ER 208 at p. 213; [1969] 2 WLR 168 at 170: e

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word ‘jurisdiction’ has been used in a very wide sense, and **I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question.** But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any f
g
h
i

- a* of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *R v. Governor of Brixton Prison, ex parte Armah* [1968] AC 192 at p. 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the inquiry and
- b* does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the Court in certain circumstances to correct an error of law.

Threshold And Anisminic Jurisdiction In Industrial Law

- c* The distinction between the two types of jurisdiction thus far discussed assumes great importance in the context of industrial adjudication. For there are different levels at which the machinery created by statute operates and it is important to determine the level at which the dichotomy exists.
- d* First, there is the conciliatory level. Here, all that the Director-General of Industrial Relations is concerned with is whether the parties are able to settle their differences. All that is required to activate the conciliatory jurisdiction is a complaint under s. 20(1) of the Act. Consequently, there is no question of there being any wider jurisdiction at this stage.
- e* Second, the reporting level. Once the Director-General of Industrial Relations finds the dispute irreconcilable, he merely makes his report to the Minister. If it is found that he has exceeded his powers, his action is liable to be quashed in certiorari proceedings. See, *Minister of Labour and Manpower & Anor. v. Wix Corp South East Asia Sdn. Bhd.* [1980] 2 MLJ 248; *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1996] 1 MLJ 481, 521. Again,
- f* there is no wider jurisdiction.
- Third, the referral level. When the Minister receives notification from the Director-General that the dispute cannot be settled, he must decide whether
- g* to refer it to the Industrial Court. He is not to refer all disputes to the Industrial Court. The question he must ask himself is whether, having regard to the facts and circumstances of the given case, the representations made by the workman is frivolous or vexatious. This is called the "Hashim Yeop test". See, *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9; *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1996] 1 MLJ 481, 514. All that is required to call for an exercise of power by the Minister is the existence of a notification that a trade dispute – as defined by the Act, which is the sense in which that expression is employed in this judgment – cannot be settled. There is therefore no question of any wider jurisdiction existing at this
- i* stage.

But the act of the Minister making the reference has, as will be seen in a moment, jurisdictional consequences. The decision to refer or not to refer a dispute is therefore a separate and distinct act that may be questioned in judicial review proceedings. a

Fourth and last, the adjudicatory level. It is important to observe that, save in very exceptional cases which are not relevant to the present discussion, the Industrial Court, unlike the ordinary Courts, is not available for direct approach by an aggrieved party. Access to it may only be had through the three levels earlier adverted to. The Industrial Court is therefore empowered to take cognisance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction. b
c

Once it is seised of the dispute in the threshold sense, the Industrial Court, unlike the authorities at the preceding three levels, is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. Thus, for example, it has jurisdiction to decide whether the particular claimant is a workman or whether a dispute is extra-territorial in nature. This is sometimes referred to as "the jurisdiction to decide whether there is jurisdiction". d

We therefore take this opportunity to emphasise that, because of the different situations in which challenge to a deciding power may be taken, the term "jurisdiction" is an expression that takes its colour from its context. Thus, when one speaks of "the jurisdiction" of the Industrial Court, it is of the essence to determine which jurisdiction that is being spoken of. It may refer to the threshold jurisdiction conferred by the Ministerial act of referring a trade dispute; or it may equally refer to jurisdiction in the wider Anisminic sense. Because the grounds upon which the decision of a public decision-maker may be challenged have now been more or less settled (see, *Council of Civil Service Unions v. The Minister for the Civil Service* [1985] AC 374; *Rama Chandran v. The Industrial Court of Malaysia*, *Supreme Court Civil Appeal No. 02-13-94*), less difficulty may present itself when determining whether the Industrial Court has exceeded its jurisdiction in the wider sense. However, the same cannot be said of challenges that go to the threshold jurisdiction of the Industrial Court, particularly in the employment of the remedy of prohibition. e
f
g

The question that has fallen for acute consideration in this appeal is the point at which the challenge ought to be taken. Should it be at the point at which the Minister makes the reference? Or could it be taken at the point at which the Industrial Court is seised of the dispute? It is to these matters that we now propose to address ourselves. h

i

a Point Of Challenge

b In the normal s. 20 case, the Industrial Court, after receiving the reference from the Minister, and after delivery of pleadings, goes on to decide whether there was a dismissal, and if so, whether the dismissal was for just cause or excuse. What therefore comes up for judicial review in *certiorari* proceedings is an award arrived at after all the merits of the case have been gone into.

c But cases have arisen, as evidenced by the decisions reported in the Malayan Law Journal, where the employer takes a preliminary objection as to the jurisdiction of the Industrial Court to entertain the claim, for example, on the ground that the claimant is not a workman. *Assunta Hospital v. Dr. A. Dutt* [1980] 1 MLJ 96, affirmed in [1981] 1 MLJ 115 ("*Assunta Hospital No. (1)*"), *Inchcape Malaysia Holdings Bhd. v. R.B. Gray* [1985] 2 MLJ 297, and *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 369 are all cases where such a preliminary challenge was taken.

d In *Assunta Hospital No. (1)* [1980] 1 MLJ 96, Dr. Dutt made representations under s. 20 of the Act, claiming that he had been dismissed without just cause or excuse. The Minister referred those representations to the Industrial Court. The reference was not challenged. Instead, the hospital, in the proceedings before the Industrial Court, took a preliminary objection as to the jurisdiction of that Court, *inter alia*, on the ground that Dr. Dutt was not a workman. **e** The Industrial Court ruled that he was. The hospital then took out an application to prohibit the Industrial Court from hearing the case on its merits. Mohamed Azmi J (as he then was) when dismissing the application said:

f My first observation is that the Minister of Labour is not a party in this case; nor is there any relief sought against his decision. On the face of the notice of motion, it must, therefore, be assumed that the exercise of the Minister's power under s. 20(3) in referring Dr. Dutt's representation to the Industrial Court is not challenged. In the present application for prohibitory order, the question, therefore, arises whether the Industrial Court (in the instant case, the Chairman of the Court) can refuse to make an award in respect of a representation referred to it by the Minister for Labour. **g** In my judgment, there is no provision in the Industrial Relations Act where the Industrial Court can disregard a decision made by the Minister under s. 20(3) of the Act. That section gives unfettered discretion to the Minister; and the exercise of that discretion has not been specifically challenged in the notice of motion. **h** The Minister is not obliged to state the grounds on which the discretion has been exercised. It might well be that he is unable to decide whether Dr. Dutt is or is not a workman under s. 20(1). As stated by Suffian FJ (as he then was) in *Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v. The Industrial Court & Ors.* [1970] 1 MLJ 78, 81:

i

Before us the regularity of the Minister's act is not impugned and under s. 114 of the Evidence Ordinance this Court may presume and does presume that the Minister's official act has been regularly performed. When the matter has been referred to the Industrial Court by the Minister in the proper exercise of his power, what is the Industrial Court to do? Can it decline to act? I do not think so. The scheme of the Act read as a whole is that once a dispute of this nature has been referred by the Minister to the Industrial Court, the Court is at once invested with jurisdiction and is obliged to decide one way or another ...

a

b

Similarly, in the present case, Dr. Dutt being dissatisfied with his dismissal, has made representation in writing under s. 20(1) of the Act. Acting under s. 20(3), the Minister has referred the representation to the Industrial Court for an award. What can the Industrial Court do other than entertain the representation and decide one way or another? The only difference between the Sri Jaya case and the present case is that the reference made by the Minister is not under the same section of the Act. The issue is the same, viz. can the Industrial Court refuse to make a decision once a representation is referred to it by the Minister? Again, in *Attorney-General, Malaysia v. Chemical Workers' Union of Malaya & Anor.* [1971] 1 MLJ 38 it was held by Abdul Aziz J that once a case is referred to it, the Industrial Court is seised with power to hear the dispute and make its award.

c

d

I am, therefore, of the view that whatever may be the rights of the parties, once the case is referred to the Industrial Court, it is fully endowed with jurisdiction.

e

Once endowed with jurisdiction, it is for the Industrial Court to decide, *inter alia*, whether Dr. Dutt is a "workman" within the meaning of s. 20(1). If he is a workman, the Court must decide whether he has been dismissed without just cause or reason. If the Court decides he has been dismissed without just cause or reason, the Court will proceed to make an "award", which under s. 2 is not confined merely to reinstatement but is wide enough to cover the power to make other orders in respect of the matter referred to it.

f

The essence of his Lordship Mohamed Azmi J's decision, which was affirmed by the then Federal Court and with which we express our unqualified agreement, is that the threshold jurisdiction of the Industrial Court may be only questioned by challenging the Minister's reference. It follows that a party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry, eg, because the dispute is extra-territorial in nature, must do so by seeking to quash the Minister's reference, and, in the same application ask for an order of prohibition against that Court. In other words, the threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him.

g

h

i

- a* We are of the view that, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection. For the legislature's paramount concern in passing the Act is to ensure speedy disposal of industrial disputes. And permitting preliminary objections to the threshold jurisdiction being taken
- b* will only delay industrial adjudication.

- Take this very case. The appellant's services were terminated in January 1989. The Minister made his reference on 13 September 1990. At present, some six years later, all that has been decided is that the Industrial Court was right in concluding that it had threshold jurisdiction. The merits of the appellant's
- c* representations are yet to be investigated into. In a war of attrition such as this, it is always the workman who suffers. The delay that would be caused by permitting such preliminary objections as was taken in this case, is in itself an excellent reason for adhering to the view expressed by Mohamed Azmi J in *Assunta Hospital No. (1)* (*supra*).

- d* Mr. Sivabalah has however asked us to exercise caution when declaring the law in this area. He says that unless the right to take preliminary objections to threshold jurisdiction before the Industrial Court is preserved, much time, energy and money may be unnecessarily thrown away. He has argued that no
- e* useful purpose would be served in having a full scale hearing before the Industrial Court only to discover at the end of it all that the tribunal had no jurisdiction in the first place to entertain the dispute. He has drawn our attention to two cases which, according to him, support his argument and tell against the proposition we have formulated a moment ago.

- f* The first of these is the decision of the former Federal Court in *Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v. Lee Eng Kiat & Ors.* [1981] 1 MLJ 238. It is a decision of a strong Court whose judgment was delivered by Raja Azlan Shah CJ (Malaya) (as he then was), a Judge of great learning. It was a case where a workman had exceeded the prescribed time limit – then fixed
- g* at one month – in making his representations. The dispute was nevertheless referred by the Minister to the Industrial Court. The employer did not challenge the reference. But it took the point of jurisdiction before the Industrial Court which ruled, quite wrongly, that it had jurisdiction to hear the case on its merits. The employer then moved for prohibition which was refused by the High Court. In allowing the appeal and directing prohibition to issue, the
- h* learned Chief Justice of Malaya said:

- We cannot agree with the learned Judge that it was for the Director-General to decide whether the claim was made within the time limit, and we think he went too far when he said that there was evidence for the Director-General to
- i* come to the conclusion that their claim was made within time. The

It would take much for us to dissent from the views expressed by so learned a Judge. But we find those views to be *ex facie* inconsistent with the proposition stated by Mohamed Azmi J in *Assunta Hospital No. (1) (supra)*

a with which we find ourselves in agreement. There are three courses open to us to resolve this conflict in the approach that is to be taken towards the threshold jurisdiction of the Industrial Court.

The first is to formally overrule *Fung Keong*. But we are not prepared to do that because of the soundness of the actual decision in that case.

b The second course that is open for us is to restrict the remedy of prohibition in the context of industrial law. However, that would, as correctly pointed out by Mr. Sivabalah, require us to depart from jurisprudence that has been well established for at least a century without any reasonable basis warranting such departure. We accordingly do not perceive the second course to be open to us to pursue.

c Thirdly, we may, while accepting the principle established by *Assunta Hospital No. (1)* and those cases it followed, recognise *Fung Keong* as establishing a very limited exception thereto only in cases where the representations under s. 20(1) of the Act are in fact made beyond the time prescribed by that section. This is the course that commends itself to us. Indeed, we are of the view that the decision in *Fung Keong* may be justified upon the narrow ground that the Minister had acted in violation of the provisions of s. 20(1) by referring the dispute to the Industrial Court when the representations were made to the Director-General beyond the statutory time limit. In those circumstances the Minister obviously had no power to confer threshold jurisdiction upon the Industrial Court.

d It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s. 20(1) were made out of time, he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg, whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

e In our judgment, unless the Minister is separately or jointly challenged in making a reference, the High Court should be very slow to grant leave to apply for an order of prohibition against the Industrial Court whilst a reference under

s. 20 is pending before that tribunal. To stay such proceedings would cause undue delay and lie against the interests of industrial peace. *a*

We now turn to the relatively easier task of dealing with the second authority relied upon by Mr. Sivabalah. It is the rather controversial decision of the precursor of this Court in *Inchcape (supra)*. That decision was reviewed at some length by this Court in *Hoh Kiang Ngan (supra)*. No useful purpose will be served by a regurgitation of the criticism levelled against it. It is a decision that was plainly wrong, even upon its own facts. It also failed to properly appreciate the judgment of Mohamed Azmi J and of the former Federal Court in *Assunta Hospital No. (1)*. In our judgment, the time has come for this Court to recognise that *Inchcape* was wrongly decided and is no longer good law. All that is required is to formally overrule it and that we now do. *b*
c

The Result

Having given this matter our most careful consideration, we were of opinion that the learned Judge was wrong in holding that the Industrial Court lacked jurisdiction to hear and decide upon the dispute properly referred to it by the Minister. In the result, we allowed the appeal, set aside the learned Judge's order and awarded costs to the appellant here and in the Court below. The matter was remitted to the Industrial Court for hearing on the merits. The deposit paid into Court was ordered to be refunded to the appellant. *d*
e

Reported by WA Sharif

f

g

h

i

*a**b*

This page is intentionally left blank

*c**d**e**f**g**h**i*